Supreme Court, U. S.
FILED
SEP 19 1978
MICHAEL RODAK, JR., CLERK

No. 78-119

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES and DONALD W. MOOS, Its Director,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors-Respondents.

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF THE RESPONDENT, YAKIMA NATION, IN OPPOSITION

JAMES B. HOVIS
HOVIS, COCKRILL & ROY
Counsel for Petitioners

Office and Post Office Address:
316 North Third Street
P. O. Box 487
Yakima, Washington 98907
(509) 575-1500

No. 78-119

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES and DONALD W. MOOS, Its Director,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors-Respondents.

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF THE RESPONDENT, YAKIMA NATION, IN OPPOSITION

JAMES B. HOVIS
HOVIS, COCKRILL & ROY
Counsel for Petitioners

Office and Post Office Address:
316 North Third Street
P. O. Box 487
Yakima, Washington 98907
(509) 575-1500

INDEX

	Page
QUESTIONS PRESENTED	1
CONSTITUTION AND TREATY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
ARGUMENT	9
CONCLUSION	14

TABLE OF AUTHORITIES

Table of Cases

Bryant vs. Ohio, 362 U.S. 906 (1960) 14

Columbia River Fishermens' Protective Union Inc. et al. vs United States District Court for the District of Oregon 573 F2d 1123 (9th Cir 1978) 3

Commissioner vs. Sunnen, 333 U.S. 591, 597 (1948) 5

Hutto vs. Finney, ... U.S. ... 46 L. Week 4817, 4819 (June, 1978) 13

Hecht Company vs. Bowles, 321, 329 (1944) 13

Maryland vs. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) 14

Milliken vs. Bradley, 433 U.S. 267, 280 (1977) 13

Missouri vs. Holland, 252 U.S. 416 (1920) 11

Puget Sound Gillnetters vs. Moos, 88 Wn 2d, 677 565 P2d 1151 (1977) 9, 12

Seufert Brothers Company vs. United States, 249 U.S. 194 (1919) 4

Washington State Commercial Passenger Fishing Vessel Association vs. Tollefson, 87 Wn 2d 417, 553 p 2d 113 (1976) 9, 12

Swann vs. Charlotte - Mecklenburg Board of Education, 402, U.S. 1, 16 (1971) 13

Page

Tulee vs. State of Washington, 315 U.S. 81 (1942) 4

United States vs. Johnson, 319 U.S. 302 (1942) 12

United States vs. Oregon, 302 F. supp 899 (D. Ore 1969) Subsequent orders aff'd 529 F 2d 570 (9th Cir 1976), 573 F2d 1123 (9th Cir 1978) 4, 5, 6

United States vs. Taylor, 3 Washington Territorial Reports 88 (1887) 4

United States vs. Washington, 384 F. Supp 312 (W.D. Wash 1974), aff'd 520 F 2d 676 (9th Cir 1975) *cert. denied.* 423 U.S. 1086 (1976). Subsequent Orders affirmed 573 F2d 1117, 1119, 1121, 1123 (9th Cir 1978) 4, 5

United States vs. Winans, 198 U.S. 371 (1905) 4

CONSTITUTIONAL PROVISIONS

Article III, §1 ..... 2, 11

Article III, §2 ..... 2, 11

Article IV, Paragraph 2 ..... 2, 11

Article X 11

TREATY PROVISIONS

Treaty with the Yakimas, 12 Stat. 951 Article III 2, 3

MISCELLANEOUS

Hendrick, *Bulwark of the Republic,* "The Rise and Fall of Nullification", pp 191-258 9

No. 78-119

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES and DONALD W. MOOS, Its Director,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors-Respondents.

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF THE RESPONDENT, YAKIMA NATION, IN OPPOSITION

I.

QUESTION PRESENTED

Power of federal courts to protect treaty reserved rights and a national resource involving anadromous fish, where the action or inaction of a state and its citizens is adverse to both federal interests.

II.

CONSTITUTION AND TREATY PROVISIONS INVOLVED

A. **Constitutional Provisions:**

1. Article VI, Paragraph 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Article III, Section 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish***."

3. Article 3, Section 2:

"The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their authority;***"

B. **Treaty with the Yakimas** (12 Stat. 951):

1. Article III, paragraph 2:

"The exclusive right of taking fish in all streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory***"

III.

STATEMENT OF THE CASE

Respondent, Yakima Indian Nation, objects to the petitioner's statement of the case, in that it omits certain pertinent facts essential to a full and complete statement; without which, petitioner's statement is strongly biased in petitioner's favor.

Full and accurate statements require discussion of an included companion case, wherein almost identical injunctive relief for which petitioner seeks review, was affirmed in the relevent decision of April 24, 1978 by the Court of Appeals for the Ninth Circuit. This now *res judicata* relief was granted by the Federal Court for the District of Oregon in *Columbia River Fishermens' Protective Union, Inc., et al.*, vs. *United States District Court for the District of Oregon*, 573 F2d 1123 (1978). (See Washington Petition Appendix A.) Likewise, full and accurate statements require the recitation of court recorded history of the treaty reserved fishing rights of the Yakima Indian Nation, a party to both rulings.

This Court, as well as other federal courts, has found it necessary to restrict state and non-Indian intrusions on the treaty fishing rights reserved by the Yakima Indian Nation in Article III of the *Treaty with the Yakimas* (12 Stat. 951).

The first case interpreting the Yakima Nation's

reserved fishing rights was *United States vs. Taylor*,[1] in which the Washington Territorial Supreme Court held that the Yakima Nation's reserved fishing rights encompassed the right to enjoy fishing to the same extent as they had at treaty time. Though this determination was made early on,[2] this was not the end of attempts to infringe upon the Yakima Nation's treaty reserved fishing rights. This Court by plenary action found it necessary to protect this particular treaty right reserved by the Yakima Nation in no less than three cases. *United States vs. Winans*, 198 U.S. 371 (1905); *Seufert Brothers Company vs. United States*, 249 U.S. 194 (1919) and *Tulee vs. State of Washington*, 315 U.S. 681 (1942).

Notwithstanding continued rejection of state and non-Indian claims (that petitioner again repeat), it has become necessary again in the last decade that immediate and continuing relief be sought from federal courts to protect the treaty reserved fishing rights of the Yakima Nation. Reserved fishing rights that needed protection were located, among other places on the Columbia River and on the Puget Sound. The Columbia River traverses the State of Washington and

[1] 3 Washington Territory Reports 88 (1887).

[2] 1887. The Yakima Treaty was ratified in 1859. Washington did not join the Union until 1889. It was established below in *United States vs. Washington* and *United States vs. Oregon*, infra, that at treaty times the Yakima Nation landed many more fish in numbers and percentage of the catch than their present share of the current landings.

in parts serves as the border between the State of Oregon and Washington. The Puget Sound is contained within the State of Washington and the border between the United States and Canada traverses the upper portions of Puget Sound.

In 1969, a decision filed by the Federal District Court for the District of Oregon in *United States vs. Oregon*,[3] reaffirmed the reserved fishing rights of the Yakima Nation in the Columbia River. Subsequently, in 1974, a decision of the Federal District Court for the Western District of Washington, in *United States vs. Washington*[4] established the reserved fishing rights of the Yakima Nation in Puget Sound waters. Both district courts retained jurisdiction for the purpose of enforcing its judgments and injunctive relief.[5] Though Washington was not an original party in the case affecting the treaty reserved rights on the Columbia, it was granted the right to intervene in *U.S. vs.*

[3] 302 F. Supp 899 (D. Ore 1969); *subsequent order* (providing for 50% share of Columbia River run for treaty reserved fishing) *affirmed*, 529 F 2d 570 (9th Cir. 1976). *Subsequent order aff'd* upholding enforcement orders under this decree like those petitioner wishes reviewed by the Ninth Circuit. 573 F 2d 1123, (9th Cir. 1978). Petition for certiorari not filed.

Washington is herein collaterally estopped from objecting to the litigated quantification of the treaty reserved fishing rights of Yakima Nation and court enforcement of that reserved right. *Commissioner vs. Sunnen*, 333 U.S. 591, 597 (1948).

[4] 384 F. Supp 312 (W.D. Wash. 1974), *aff'd*, 520 F2d 676 (9th Cir. 1975), *cert denied*, 423 U. S. 1086 (1976) *subsequent orders aff'd*, 573 F. 2d 1117, 1119, 1121, 1123 (9th Cir 1978).

[5] The district courts exhibited necessary foresight in retaining jurisdiction. Unfortunately, it has been necessary to continually enjoin breaches by the States of Oregon and Washington of the district courts decisions and orders.

Oregon, supra and during the times important to this discussion have been a party to that case.[6] Since their original decisions, both district courts have exercised their retained jurisdiction to protect the established treaty reserved fishing rights of the Yakima Nation and other Indian tribes. From the outset of the intervention of Washington in the Columbia River case and from the very announcement of the decision in the Puget Sound case, it became evident that Washington and its fishermen were going to attempt to frustrate the holdings of the two district courts and their later affirmance by the Court of Appeals for the Ninth Circuit. The Court of Appeals for the Ninth Circuit in the decision for which petitioners seek partial review took note of these "extraordinary machinations" in resisting the decree, observing that except for some of the desegregation cases, "the District Court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."

While these "extraordinary machinations" were reaching their culmination in non-Indian resource destructive fishing, the State of Oregon and Indian tribes on the Columbia River were attempting to preserve the fishery on the Columbia through the vehicle of a

---

[6] Washington was a party during the affirmation of subsequent orders by the Court of Appeals for the Ninth Circuit. (529 F 2d 570, (1976); 573 F 2d, 1123 (1978) from which no review has been sought.

joint management plan. This plan was finally made possible by the Columbia River tribes agreeing for a period of five years to forego exercising some of their established treaty reserved fishing rights. In February of 1978, the management plan was signed by the Columbia River tribes, the State of Oregon, the State of Washington, and the United States. This approved plan was adopted by the federal court by an agreed order with all parties including petitioner Washington and respondent, agreeing thereto. Thereafter, Washington's fish management agencies and the Washington judiciary claimed that Washington had no authority to agree to the plan and therefore could not fulfill its obligation to regulate non-Indian fishermen under the agreed plan. Washington did not move to amend the plan or the resulting agreed order, but attempted to hold the Indian tribes to their obligations under the plan, while claiming that Washington courts would not allow them to fulfill their obligation under the plan. Based on this lack of authority, Washington frustrated the plan and illegal, wasteful fishing resulted on the Columbia so that the Indians were unable to land their reduced share under the approved plan without seriously jeopardizing the necessary escapement. This resulted in the Indians obtaining, even with the district court's necessary assistance, (which was affirmed by the Ninth Circuit Court of Appeals) considerably less

than the share of the harvest agreed to by Washington and Oregon. It was only through the actions of the Federal Court for the District of Oregon, which parallel the actions that petitioners wish to have reviewed, that non-Indian fishermen were restrained from illegally taking even a larger amount of the established treaty reserved share guaranteed by the agreed management plan.

Though the petitioners do not and can not contend that federal court action to prevent intrusions on the treaty reserved fishing rights and national resource in the Columbia River is improper; they do make this contention, as regards the same rights of the Yakimas and the same national resource, in the Puget Sound case area. The record in the Puget Sound case area, is just as clear, that absent action of the federal courts, intrusion on treaty reserved fishing rights and damage to runs of anadromous fish will result.

Other respondents have more completely detailed the intrusions on the Yakima Nation's treaty reserved rights and the danger to the resource. However, it is clear from any review of the factual situation or claims of the petitioners, that the State of Washington is unable or unwilling to act according to the federally determined law of this land to protect either determined treaty reserved rights or runs of anadromous fish. Petitioner's contention, both in media and judicial

forums, is that the federal courts in their recognition of a treaty reserved right in the fisheries are totally wrong and the only acceptable solution is that the federal courts reverse their recognition of this reserved right and repose control of this fishery in the State of Washington which will not make any allocation for treaty reserved rights.

IV

ARGUMENT

This Court must not, through the granting of writs of certiorari, support petitioner's acts of *nullification.*[7] Quite clearly, petitioners in this and other petitions, including the contrived petition in *State of Washington vs. Washington State Commercial Passenger Fishing Vessel Association,* 77-983[8] and the petitions in *State of Washington vs. United States,* 78-119 and *Puget Sound Gillnetters vs. U.S. District Court for Western Washington,* 78-139; are primarily seeking to overturn a fully adjudicated determination of treaty reserved fishing rights. Respondent acknowledges that petitioner presents the question of district court enforcement of a fully adjudicated decree, but this clearly is

---

[7] Washington and its allies, present actions are so similar to the actions of the Southern States in the first half of the nineteen century; that "nullification" is clearly the word to be used. See: Hendrick, *Bulwark of the Republic,* "The Rise and Fall of Nullification", pp 191-258.

At this early time, "nullification" was defined as: "nullification, anarchy reduced to a system" (p. 255). We adopt that definition.

[8] *Puget Sound Gillnetters vs. Moos,* 88 Wn. 2d 677, 565 p2d 1151 (1977) is included in 77-983.

an attempted door opener to contest the fully adjudicated determination of involved treaty reserved rights.[9] The State of Washington, through concerted executive, legislative and judicial action, in concert with its allies, has followed a course of action that has as its acknowledged purpose the destruction of fully adjudicated treaty reserved rights. If this court wishes to bestow awards for judicial gamemanship, it could not do better than to grant the petitions in 77-983, 78-119 and 78-139.

However, the granting of the petitions will have the practical effect of forestalling a resolution of the controversy in the Puget Sound case area similar to the one that exists in the Columbia River case area. Likewise, if the petitions are granted, it must be acknowledged that the State of Oregon would be politically forced to follow Washington's now successful path of fostering controversy.

Further, there can be no doubt that if this court grants certiorari that the continuing state sponsored

---

[9] There may be those who would favor Supreme Court Review of the underlying adjudication of the treaty reserved fishing rights in an attempt to obtain Washington's compliance with the declared law of the land. Tempting as this may be, Respondent is not a member of that school. Experience has taught Respondent that appellate court affirmance has not dissapated the venom directed against the District Court or in any way assured compliance with the District Court's orders. Likewise, there is no indication in Washington's briefs, that there has been acceptance—in other than a most limited way—of this Court's past rulings involving the Yakima Treaty. Finally, and most important; the underlying adjudication is *re judicata*. It should not be raised at this time.

controversy will result in continued illegal fishing during the pendency of this court's plenary determination. Encouragement of this rebellion with its disasterous effects on the lower courts, the fishery and fully adjudicated treaty fishing rights, is undoubtedly of great concern to this court.

Washington's executive and judiciary throwing down the gauntlet in the federal area of *treaty rights* is unprecedented for over one hundred years. As this court has reminded us in *Missouri v. Holland,* 252 U.S. 416 (1920), a treaty made by the President with the required concurrence of two thirds of the Senate is, under the supremacy Clause of Article VI § 2, part of "the supreme Law of the land" which takes precedence over contrary state law.

Article III of the *Constitution* makes it just as clear that "*all* cases" "arising under treaties" are within the judicial power of the United States which is vested in the "Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Petitioner's reliance on Article X to excuse this conflict is inapposite. Article X must give way to Article VI and Article III, which, with absolute clarity and without exception, gives the right of way to the national authority. *Missouri v. Holland, supra.*

Washington, with its allies' assistance, having interjected itself into the national right of way in the

vehicle of the cases of *Puget Sound Gillnetters, supra,* and *Washington State Commercial Passenger Fishing Vessel Association, supra,* (pending in 77-983), now seek to use this feigned vehicle to supply a collision as a basis for a writ. This feigned vehicle does not supply the necessary conflict. It does not assume the honest and actual antagonistic assertion of rights to be adjudicated — a safeguard essential to the integrity of the judicial process, and one held by this Court to be indispensable to the adjudication of questions by this Court. *United States vs. Johnson,* 319 U.S. 302 (1942).

Washington, and its allies, seek to invade the national right of way only for the purpose of collision and to make the national right of way rough. Washington and its allies readily agree that they are unable to take any action to preserve the national interests. The record is clear that this inability is joined with their unwillingness. The efforts of the United States Court for the Western District of Washington affirmed by the Court of Appeals for the Ninth Circuit are necessary efforts to smooth the state inspired rough spots in the national right of way.

Any lesser efforts would be an abdication of the national purpose so explicitly contained in the Constitution. This Court has made it clear that the lower courts have a duty to fashion such a remedy to correct a systematic invasion of this national right of way.

Milliken v. Bradley, 433 U.S. 267, 280 (1977); *Swann v. Charlotte - Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971); *Hecht Company vs. Bowles,* 321 U.S. 321, 329 (1944); *Hutto v. Finney,* ..... U.S. ..... 46 L. Week 4817, 4819 (June, 1978).

The actions of Washington, and its allies, have presented this court with a very serious problem. No matter what action this court takes in granting or denying certiorari, the announcement of the decision will support the continuing dedicated resistance to the announced law of the land. If certiorari is granted, as officials in Washington have promised the non-Indian fishermen, we can expect only totally uncontrollable, illegal fishing in the Puget Sound area and moves to force Oregon to pursue the same course in the Columbia River area. This action can seriously jeopardize not only the adjudicated reserved rights of the treaty fishermen, but the resource as well. While the danger to the adjudicated reserved rights and the total resource will be lessened by the denial of certiorari on all petitions, the unanswered rulings of the State will pose a problem. This is an extraordinary case and one that calls for this court to pursue extra-ordinary methods in announcing its decision on certiorari. Respondent is fully cognizant of the pressures that generally prohibits this Court from explaining its granting or denial of certiorari. However, this case would seem

to call for an opinion accompanying the court's ruling in 77-983 such as this Court has deemed necessary in cases like *Bryant vs. Ohio*, 362 U.S. 906 (1960) and *Maryland vs. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950).

CONCLUSION

For the above reasons, writs of certiorari should not issue in 77-983, 78-119 and 78-139. Denial of writ in feigned 77-983 should be explained.

Respectfully submitted,

JAMES B. HOVIS
HOVIS, COCKRILL & ROY
Counsel for Respondent,
Yakima Indian Nation

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 1978, three copies of this brief in opposition were mailed in a United States mailbox, first class postage prepaid, to Slade Gorton, Edward B. Mackie, James M. Johnson, Counsel for State of Washington, Temple of Justice, Olympia, Washington 98504; to Charles T. Yates, Moriarty, Long, Counsel for Puget Sound Gillnetters Association, Mikkelborg & Broz, 330 Seattle First National Bank Building, Seattle, Washington 98154, and to Joseph T. Mijich, John P. World, Counsel for Purse Seine Vessel Owners Association, 3920 Bank

of California Center, Seattle, Washington 98164. I further certify that all parties required to be served have been served.

JAMES B. HOVIS
of Hovis, Cockrill & Roy
Counsel for Respondent Yakima Nation and Member of The Bar of this Court.